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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSINNEIL GAIMAN and MIRACLES AND
MARVELS, LLC,

Plaintiffs,

v.

TODD McFARLANE, et al.

Defendants-Counterclaimants.

Case No. 02-C-0048-S
(Western District of Wisconsin)**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION IN LIMINE #3
TO EXCLUDE GREG CAPULLO AS A WITNESS**

Defendants Todd McFarlane, Todd McFarlane Productions, Inc., TMP International, Inc., and McFarlane Worldwide, Inc. (collectively, the "McFarlane Defendants"), through their attorneys LaFollette Godfrey & Kahn and Blackwell, Sanders, Peper, Martin, and defendant Image Comics, Inc., through its attorneys, Brobeck, Phleger & Harrison, respectfully submit this Response Brief in Opposition to Plaintiffs' Motion in Limine #3 to Exclude Greg Capullo as a witness.

Plaintiffs move for an order *in limine* excluding the testimony of Greg Capullo solely on the ground that defendants did not identify Mr. Capullo by name in their Rule 26(a) disclosures as a person Defendants might use to support their claims or defenses.

In fact, Mr. Capullo—the principal artist on the entire *Angela* miniseries—was included in paragraph 7 of those disclosures (attached as Exhibit A to the motion) as follows:

7. The various artists, pencil artists, colorists, letterers, inkers and other contributors to the comic books at issue in this lawsuit, all of whom are identified on the inside front covers of those comic books. To the extent that Mr.

Gaiman contends that he is the sole or principal author/creator of one or more of the comic books at issue, these individuals have personal knowledge as to their own involvement in the creation of those publications.

Mr. Gaiman knows Mr. Capullo quite well, since the two worked closely together in the creation of the *Angela* miniseries. He therefore cannot claim that he did not know Mr. Capullo fit the description above or that he had relevant knowledge regarding this case. However, Mr. Gaiman thereafter registered copyrights in what he describes as his “thumbnail sketches” of those three comic books—a creative task normally within the scope of the artist and not the writer. As the McFarlane Defendants have informed plaintiffs, Mr. Capullo will testify that he Mr. Gaiman never showed him those “thumbnail sketches” before he created the artwork for the three comic books and thus has no independent claim to any of the artwork in that issue.

The McFarlane Defendants have proposed that the following stipulated fact to be read to the jury in lieu of live testimony from Mr. Capullo:

Exhibits 23, 26 and 29 are copies of the Thumbnail sketches for issues 1, 2 and 3 of the *Angela* comic book series. Exhibits 319, 320 and 321 are the copyright registrations obtained by Mr. Gaiman for those Thumbnail sketches. Mr. Gaiman ~~cannot~~ recall whether he ever showed those Thumbnail sketches to Greg Capullo, who created the artwork for issues 1, 2 and 3 of the *Angela* comic book series. Mr. Capullo does not recall seeing those Thumbnail sketches before he created the artwork for those comic book issues.

If plaintiffs accept this stipulation, this motion is moot. If not, though, then McFarlane defendants should be allowed to call Mr. Capullo at trial as—in the words of their Rule 26(c) disclosure—one of the “artists “ who contributed “to the comic books at issue in this lawsuit” and is “identified on the inside front covers of those comic books” to testify “as to [his] own involvement in the creation of those publications,” especially in light of Mr. Gaiman’s decision, years after the fact, to register copyrights in those thumbnail sketches in support of his claim that he was somehow the principal creative force behind those comic books.

Dated: Sept 20, 2002

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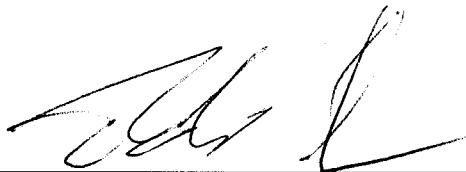
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served on all counsel of record via hand delivery and and regular mail this 20th day of September, 2002, addressed to the following:

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A handwritten signature in black ink, appearing to read 'K. F. Levin', is written above a horizontal line.